Supreme Court, U.S.
FILED
JUL 18 1984
ALEXANDER L. STEVAS
CLERK

No. 82-976

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner

vs.

ROSCOE HOWARD JR.,

Respondent.

OPPOSITION TO PETITION

FOR REHEARING

EUGENE R. LORENZ
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1. REASONS FOR DENYING PETITION FOR REHEARING 1

   REHEARING OF THIS CASE AND CONTINUED INCARCERATION OF DEFENDANT FRUSTRATES JUSTICE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

TABLE OF CASES CITED

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1. California vs. Beheler 103 S. Ct. 3519;77 L.Ed 2d at 1275 . . .1

2. Carlos vs. Superior Court 35 Cal. 3d 131 (1983) 1,2

3. Enmund vs. Florida 458 U.S. 782; 102 S. Ct. 3368 (1982). . . . 2

4. Coker vs. Georgia 433 U.S. 584; 97 S. Ct. 2861 (1977) 2

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FOR REHEARING

The Attorney General of the State of California seeks rehearing of this Court's April 30, 1984, denial of their petition for writ of certiorari. Petitioner claims that a rehearing of this matter would promote the interests of justice. Petitioner argues that respondent's co-defendant

Beheler, the subject of this Court's opinion in California vs. Beheler 103 S. Ct. 3519; 77 L. Ed 2d at 1275, might use this court's denial of certiorari to "Further artificially deflate this sentence."

The California Supreme Court let the air out of the California Attorney General's position in Carlos vs. Superior Court 35 Cal. 3d 131 (1983). Pursuant to the decision co-defendant Beheler was released from custody on June 18, 1984. A Certified Copy of the Superior Court minute order of Beheler's release from custody is attached as an exhibit.

Basically the California Supreme Court reasoned that the finding of special circumstances and the imposition of the death penalty or life without possibility of parole upon an accomplice who did not intend a killing would probably constitute cruel and unusual punishment. The California Supreme Court construed the state's

death penalty statute to include a requirement that defendant intended to kill. Carlos vs. Superior Court, supra at 153.

Irrespective of the Miranda issue, accomplice Beheler could only be tried for voluntary manslaughter since the perpetrator Wilbanks was the actual killer and was convicted by jury of voluntary manslaughter. Howard is in the same position as Beheler. Howard had no intent to kill nor did Howard assist in killing. Upon remand Howard can only be held culpable for the crime of voluntary manslaughter. Howard has served his time for the offense.

By inference the California Supreme Court in Carlos indicated that a death penalty statute which imposed the extreme penalties of death or life without possibility of parole for non-intentional killings would violate the cruel and unusual punishment clause of the Eighth Amendment. In part the Carlos decision is based upon this Court's

opinions in Edmund vs. Florida 458 U.S. 782; 102 S. Ct. 3368 (1982) and Coker vs. Georgia 433 U.S. 584; 97 S. Ct. 2861 (1977).

The ends of justice are served by denial of rehearing. "Ethical principles that punishment should be proportionate to individual guilt, and that a less culpable offender should not be punished more severely than a more culpable offender" are accepted principles of justice. Carlos vs. Superior Court supra. at 134

At the time of trial the jury hearing, the killer Wilbank's case, received instructions on degrees of murder and manslaughter. The jury convicted the shooter Wilbanks of voluntary manslaughter. At the separate trials of accomplices Howard and Beheler, the case was submitted to the trial jury on a theory of first degree murder with special circumstances. The trial jurors were not told that the penalty for conviction was life without possibility of parole.

Common sense dictates that justice is not served if accomplices Beheler and Howard are punished more severely than the killer Wilbanks.

CONCLUSION

Petitioner's request for rehearing should be summarily denied.

Dated: July 19, 1984 RESPECTFULLY SUBMITTED,

EUGENE R. LORENZ
Attorney for Respondent.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KERN

DATE: Monday, June 18, 1984 COURT MET AT 8:30 A.M. DEPARTMENT NO. 5

PRESENT: HON: JOHN M. NAIEN, JUDGE N. E. Limi, DEPUTY CLERK

Edyne Kenney, REPORTER S. Williams, BAILIFF

TITLE:	COUNSEL:
PEOPLE OF THE STATE OF CALIFORNIA vs. JEFFY LAIN BEHELER	Stephen Tauzer, Deputy District Attorney Julia Newcomb, Deputy State Public Defender

NATURE OF PROCEEDINGS: ACTION NO. 20967

RE-SENTENCING PER REMITTITUR
FELONY, TO WIT: 1. PC 664-211 with PC 12022(a)
2. PC 192.1

Elizabeth Gosling, Deputy Probation Officer present.

The above entitled cause came on regularly at this time today for re-sentencing with the Defendant and Counsel present in open Court as underlined above.

Cause is duly argued. The Court has read and considered the Probation Officer's Report. No legal cause.

Sentence: Count 2 - PC 192.1: Probation denied. Defendant sentenced to State Prison for the mid-term of 4 years.

Count 1 - PC 664-211 with PC 12022(a): Probation denied. Defendant sentenced to State Prison for the mid-term of 2 years plus one year for enhancement PC 12022(a). Term on Count 1 is stayed until completion of term on Count 2 and permanently thereafter.

Defendant sentenced to State Prison for TFT 4 years with credit for time served 1005 actual days.

The Court finds that the defendant has served his term in full. The Court finds that the defendant has served time in excess of term imposed and parole per PC 1170 (a)(2). Defendant not placed on parole.

Defendant ORDERED released from custody this date. Release issued.

ATTACHMENT

MINUTES

BEST AVAILABLE COPY

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PROOF OF MAILING--AFFIDAVIT

I, EUGENE R. LORENZ, the attorney for Roscoe Howard Jr., respondent herein, hereby certify that on the 19th day of July, 1984, I deposited in the United States Post Office located at 1730 18th Street, Bakersfield, California, first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Opposition to Petition For Rehearing.

EUGENE R. LORENZ
Attorney for Respondent.

Subscribed and Sworn to before me at Bakersfield, California, this 19th day of July, 1984.

Anna M. Bates
ANNA BATES, Notary Public
State of California.

OFFICIAL SEAL
ANNA M. BATES
NOTARY PUBLIC - CALIFORNIA
KERN COUNTY
My Comm. Expires Jan. 12, 1987